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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 BARRY ROSEN,
13 Plaintiff,
14 v.
15 AMAZON.COM, INC.; et al.,
16 Defendant.

Case No. 2:14-cv-02115-ABC-E

**DEFENDANT AMAZON.COM'S
NOTICE OF MOTION AND
MOTION TO DISMISS
COMPLAINT UNDER RULE
12(b)(6)**

DATE: June 2, 2014
TIME: 10:00 am
DEPT.: Courtroom 680
JUDGE: Hon. Audrey B. Collins

ACTION FILED: March 20, 2014

**TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES
AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on June 2, 2014, at 10 a.m. in Courtroom 680 of the United States District Court for the Central District of California, located at 255 East Temple Street, Los Angeles, CA, 90012, or as soon thereafter as may be heard, Defendant Amazon.com, Inc. ("Amazon") will, and hereby does, move for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Complaint of Plaintiff Barry Rosen ("Plaintiff") fails to state facts sufficient to constitute a claim upon which relief can be granted.

This motion is based on this notice of motion, the attached memorandum of points and authorities, the records and files in this action, and any argument of the parties.

This motion follows the conference of counsel pursuant to L.R. 7-3, which took place on April 21, 2013, seven days before the filing of this motion. Amazon requests that the Court grant its motion and dismiss Plaintiff's complaint as to Amazon in its entirety.

Dated: April 28, 2014

FARELLA BRAUN + MARTEL LLP

By: /s/ Deepak Gupta
Deepak Gupta

Attorneys for Defendant
AMAZON.COM, INC.

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I. INTRODUCTION AND BACKGROUND

Barry Rosen has brought over 40 copyright cases in the Central District of California alone. These cases are often disposed of on motions to dismiss and early summary judgment motions. *See, e.g., Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219 (C.D. Cal. 2010) (summary judgment against Rosen); *Rosen v. Tucows, Inc.*, case 2:13-cv-01742-SJO-MAN (C.D. Cal. Jan. 29, 2014) (granting motions to dismiss without leave to amend). As this Court has found, in a nearly identical case previously filed against Amazon, Mr. Rosen is an uncooperative—at best—participant in the litigation he unleashes. *See Barry Rosen v. Amazon.com, Inc.*, CV 12-10413 ABC (Ex) at 3 (C.D. Cal. Mar. 6, 2014) [*“Rosen I”*](“Plaintiff [Rosen] is on notice that the Court strongly disapproves of his apparent strategy” of evading questions at deposition and later “blatant[ly] attempt[ing] to ‘re-do’ it without providing Amazon an opportunity for cross-examination”).

Once again, Mr. Rosen alleges only *hypothetical* copyright infringement without alleging any facts from which the Court could plausibly infer *actual* copyright infringement. Mr. Rosen is attempting to hold Amazon liable for the continued storage on Amazon’s servers of a photo in which he claims copyright after the ability to buy that photo was disabled. He does not allege that Amazon loaded the image onto its servers, that anyone purchased the photo, or that anyone accessed it from Amazon’s servers. Instead, Mr. Rosen is attempting to use a hypothetical injury to gain access to the statutory damages of the Copyright Act. But the Copyright Act is not intended to award windfalls for theoretical harms. Because Mr. Rosen’s complaint does not allege facts that raise his right to relief beyond the speculative level, the court should dismiss his claims in their entirety.

II. THE ALLEGED FACTS

In addition to items that it offers for sale directly to consumers from its website, Amazon also allows third-party merchants to use the Amazon e-commerce platform to sell their goods over the Internet. On December 11, 2013, Mr. Rosen

1 notified Amazon that a third-party seller using the ID “The History Of the Game”
2 had listed for sale on Amazon a print of the tennis player Anna Kournikova.
3 Compl. at ¶ 11.

4 Notably, Mr. Rosen does not allege that Amazon itself had a hand in the
5 initial upload of the image. Rather, he admits that “a *seller* ... made and posted an
6 unauthorized copy of [it on][*sic*] amazon.com and images-amazon.com.” ¶ 11
7 (emphasis added).

8 Claiming a copyright to the photo, Mr. Rosen asked Amazon to take it down.
9 ¶¶ 13-14. The same day, Amazon acknowledged receipt of Mr. Rosen’s DMCA
10 notice, ¶¶ 15-16; and the very next day, Amazon responded, “The listing you
11 identified appears to have been removed from Amazon.com.” ¶ 16.¹

12 Once the listing had been promptly disabled, the photo was unavailable for
13 purchase. Mr. Rosen admits this. ¶ 16. Mr. Rosen does not allege that any prints
14 were ever sold even while the listing was up.

15 The focus of Mr. Rosen’s infringement theory is that “Amazon...only
16 disabled the ability to buy the item,” but left the photo “active and available to the
17 entire world on amazon.com and images-amazon.com.” ¶ 16. He contends that
18 after his notice was received by Amazon and the buy link for the Kournikova print
19 was removed, (1) the small JPEG image that had been uploaded by the third party
20 merchant remained stored on Amazon’s internal images-amazon.com “ecx” server,
21 and (2) a deactivated product detail page containing the image remained on
22 amazon.com (with a product status of “currently unavailable”). He contends that
23 the defunct detail page and the JPEG image *could have been accessed* by someone
24 after Amazon acted on his notice. However, he conspicuously does not allege that
25 either the JPEG or the detail listing page was ever *actually accessed* by anyone

26 _____
27 ¹ Amazon’s response suggests that the merchant who posted the product removed
28 the inventory for this product before Amazon got to it. It is clear that the Amazon
employee believed that the listing was removed.

1 other than him, or that they *could have* been reached by using Amazon’s search
 2 engine after the buy link was removed. In other words, his theory of direct
 3 infringement is that there remained a *possibility* that someone who had saved the
 4 URL of the detail listing page or JPEG image could have reentered the URL to
 5 access the image after the buy link was taken down.²

6 **III. LEGAL STANDARD**

7 A Rule 12(b)(6) motion to dismiss enables the court to weed out claims that
 8 fail as a matter of law, or are speculative and implausible. A plaintiff’s “obligation
 9 to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and
 10 conclusions, and a formulaic recitation of the elements of a cause of action will not
 11 do . . . Factual allegations must be enough to raise a right to relief above the
 12 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The
 13 pleadings must contain “enough factual matter . . . to raise a reasonable expectation
 14 that discovery will reveal evidence of” the alleged wrongdoing. *Id.* at 556.
 15 Moreover, at the motion to dismiss stage, “[t]he tenet that a court must accept a
 16 complaint’s allegations as true is inapplicable to the threadbare recitals of a cause of
 17 action’s elements, supported by mere conclusory statements.” *Ashcroft v. Iqbal*,
 18 556 U.S. 662, 663 (2009).

19 *Twombly* also admonishes Plaintiffs against using complaints as “fishing
 20 expedition[s]”—i.e., to use litigation as a way to test the plausibility of their claims.
 21 *See Twombly*, 440 U.S. 544 at 177.

22
 23
 24 ² On April 21, 2014, the parties met and conferred on the contents of this motion
 25 under Local Rule 7-3. Plaintiff’s counsel conceded that, as far as he was aware,
 26 Plaintiff was the only person who had ever viewed the links after the buy link was
 27 taken down. *See, e.g.*, Ex. 10. Plaintiff’s counsel stated he would not withdraw the
 28 Complaint, however, because it was an important legal question whether merely
 having the URLs available such that they were *potentially* accessible by others
 could constitute direct infringement.

IV. THE COMPLAINT FAILS TO PLEAD AN ACTUAL ACT OF DIRECT INFRINGEMENT BY AMAZON OR ITS USERS AFTER THE BUY LINK WAS REMOVED, WHICH IS A THRESHOLD REQUIREMENT FOR PLAINTIFF’S THEORY OF INFRINGEMENT

Plaintiff’s mere allegation that someone other than him *could have* accessed the file after the buy link was taken down in response to his notice, fails as a matter of law, because the mere possibility that someone could have viewed the file fails to state a claim for *actual* (as opposed to hypothetical) direct infringement.

Direct infringement is a requirement for any theory of relief under the Copyright Act. To show direct infringement, Plaintiff has the burden to “demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F. 3d 1146, 1159 (9th Cir. 2007).

To state a claim for secondary liability, Plaintiff must allege a direct infringement because “[s]econdary liability for copyright infringement does not exist in the absence of direct infringement by a third party.” *Perfect 10*, 508 F. 3d at 1146 (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001)); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 987 (D. Ariz. 2008), (“[A] defendant can only be held contributorily liable if a direct or primary infringement has been proved.”); *see also Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1092-93 (9th Cir. 1994) (collecting authorities). *See generally* 1 Paul Goldstein, *Copyright: Principles, Law and Practice* § 6.1, at 705 (1989) (“It is definitional that, for a defendant to be held contributorily...liable, a direct infringement must have occurred.”). This is a fundamental tenet of copyright law and it is common sense: one cannot be accountable for contributing to infringement if there is no infringement in the first place.

Beyond threadbare recitations of the legal elements of direct infringement (Compl. ¶ 10), which as a matter of law the Court should disregard, Plaintiff’s primary theory of relief, recited at paragraphs 11-18, does not fault Amazon for the

1 initial upload of the file at issue. This was the sole doing of the third party seller
2 who created the listing.³ ¶ 11.

3 Rather, Plaintiff faults Amazon for the *persistence* of the images on
4 Amazon's server storage after the buy link was removed. The Complaint goes only
5 so far to assert that his copyright *could have been* infringed: in Plaintiff's words,
6 the photo was "active and available to the entire world on amazon.com and images-
7 amazon.com."⁴ Noticeably absent is any allegation that a user *actually* viewed the
8 detail page on amazon.com or directly accessed the JPEG that it contained (which
9 was stored on images-amazon.com). Nor does he allege that these URLs remained
10 in Amazon's search engine for the public to access.

11 **A. The Plain Language of the Copyright Act Requires an Actual**
12 **Infringement, Not Mere Hypothetical Infringement.**

13 The continued presence of this image file in an unindexed and unsearchable
14 state, without an allegation that a member of the public ever viewed it, fails to state
15 a claim for direct infringement as a matter of law, and warrants complete dismissal
16 in favor of Amazon. The Copyright Act, 17 U.S.C. §§ 106(1), (3) and (5), by their
17 plain terms, give the copyright owner the exclusive rights to "reproduce," "to
18 distribute copies to the public . . . by sale or other transfer of ownership," and "to
19 display the copyrighted work publicly." Thus, the statute requires an *actual* act of
20 invasion, not a *hypothetical* or possible one. Plaintiff has failed to plead any *actual*
21 infringement as required.⁵

22 _____
23 ³ Any attempt to attach liability to Amazon for the initial upload under a theory of
24 inducement or vicarious liability, fails for the reasons stated at sections V.B, and
25 V.C, *infra*.

26 ⁴ The complaint is replete with boilerplate recitations of the legal standards for
27 direct and secondary infringement. *See* Compl. ¶¶ 10, 18, 19, 21, 22, 23, 25. But
28 under *Twombly* and *Iqbal*, these should be disregarded at the motion to dismiss
stage. *Iqbal*, 556 U.S. at 663.

⁵ Of note, Mr. Rosen's own "investigation" does not constitute a "direct
infringement" because he cannot infringe his own copyright. *Olan Mills, Inc. v.*

1 Courts have repeatedly affirmed that infringement of one of these rights
 2 requires an *actual* violation. In *MGM Studios v. Grokster*, 545 U.S. 913 (2005), the
 3 Supreme Court examined the liability of a peer-to-peer file-sharing network and
 4 wrote that liability “*of course* requires evidence of *actual* infringement by recipients
 5 of the device, the software in this case.” *Id.* at 940 (emphasis added).

6 The Ninth Circuit has unwaveringly followed this rule. Thus, in *Perfect 10 v.*
 7 *Amazon.com*, 508 F.3d 1146, 1162 (9th Cir. 2007), the Ninth Circuit ruled that
 8 distribution requires “actual dissemination”; it should not be “deemed.” The
 9 plaintiff in *Perfect 10*, an adult entertainment magazine that provided a
 10 subscription-only website, sued Google and other internet service providers for
 11 direct and secondary infringement. Perfect 10 argued that Google had violated its
 12 distribution right because Google’s search engine provided thumbnail-sized photos
 13 in response to image search requests (some of which were copyrighted by Perfect
 14 10), and the thumbnail-sized images in these results were linked to the
 15 corresponding full-size Perfect 10 photos on other websites on the Internet.⁶ The
 16 court found that because “Google did not *communicate* [i.e., transmit] the full-size
 17 images to the user’s computer, Google did not distribute these images.” *Id.* at 1162.
 18 The court refused to graft a “deemed distribution” theory to the distribution right
 19 under 17 U.S.C. § 106(3), and instead affirmed that “the district court’s conclusion
 20 [that distribution requires an ‘actual dissemination’] is consistent with the language
 21 of the Copyright Act.” *Id.*

22 Subsequent Ninth Circuit decisions have reaffirmed the “actual” distribution
 23 rule. In *Columbia Pictures Indus., Inc. v. Fung*, 710 F. 3d 1020, 1034 (9th Cir.

24
 25 *Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) (“It is well-established that the
 26 lawful owner of a copyright cannot infringe its own copyright.”) Mr. Rosen, as the
 27 alleged copyright owner, by definition *has* the exclusive rights to distribute,
 display, and reproduce his own works.

28 ⁶ Google’s display of the thumbnail photos was found to be a fair use under 17
 U.S.C. § 107. *Perfect 10*, 508 F.3d at 1168.

2013), the Court required “evidence of actual infringement” by users of Defendant’s peer-to-peer related services. The court found that where 90-96% of the files available on the network were infringing and defendant did “not attempt to rebut the factual assertion that that his services were widely used to infringe,” the actual infringement requirement was satisfied. *Id.*

Much like in *Perfect 10*, here, there is no allegation that Amazon ever actually *communicated* the stored JPEG to any user (other than Mr. Rosen himself). Plaintiff has previously argued that the mere availability of the image on Amazon’s internal server, even if it is never viewed by anyone other than Plaintiff himself, constitutes infringement.⁷ Here Plaintiff recycles this theory, by alleging merely that the Kournikova JPEG remained on Amazon’s servers.⁸ However this Court has already noted the lack of foundation for this theory: in *Rosen I*, Judge Collins observed that though Mr. Rosen downloaded the subject images from Amazon’s image servers, “Plaintiff has presented no evidence of any other person accessing the image files.” Order, Dkt. 71 at 5.

If anything, Plaintiff’s case for “deeming” distribution against Amazon is even weaker than *Perfect 10*’s case against Google because there, individuals were able to use Google’s search engine to locate the copyrighted files. Here, there is no allegation that the image could have been found through Amazon’s search engine, thus making transmission or distribution of the photos even less plausible.⁹

⁷ See *Rosen v. Amazon*, Case No. 12-CV-10413 ABC (Ex) (C.D. Cal. Mar. 6, 2014), Plaintiff Barry Rosen’s Memorandum of Points And Authorities in Support of Motion for Partial Summary Judgment Re Liability for Copyright Infringement and Defendant’s Affirmative Defenses, Jan. 27, 2014, at 12.

⁸ The Court in its summary judgment order there did not reach the legal question of whether the mere availability of a file can constitute infringement.

⁹ The *Perfect 10* Court refused the Plaintiff’s invitation to expand liability to situations where merely making files “available” – without actual communication of the file – could be direct infringement. In doing so, the Ninth Circuit expressly refused to follow *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), on which Plaintiff relied in the parallel case. 508 F. 3d 1162

1 Mr. Rosen’s bare assertion that the files were “active and available” does not
 2 satisfy the strict *actual* infringement standard of the Copyright Act, as required by
 3 *Grokster*, *Perfect 10* and *Fung*.

4 **B. Plaintiff Further Fails to Allege Any Volitional Conduct by**
 5 **Amazon or its Users, Which is Required for Direct Infringement**
 6 **Liability**

7 The law is well-settled that direct infringement requires some act of
 8 “volitional conduct” in violation of the copyright owner’s exclusive rights.
 9 *Religious Tech. Ctr. v. Netcom On-Line Commc’n. Servs., Inc.*, 907 F. Supp. 1361,
 10 1369-70 (N.D. Cal. 1995) (“no allegations in the complaint to overcome the
 11 missing *volitional* or causal elements necessary to hold a BBS [bulletin board
 12 service] operator *directly liable* for copying that is automatic and caused by a
 13 subscriber”); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131
 14 (2nd Cir. 2008) (“When there is a dispute as to the author of an allegedly infringing
 15 instance of reproduction, *Netcom* and its progeny direct our attention to the
 16 *volitional conduct* that causes the copy to be made.”) (emphasis added); *CoStar*
 17 *Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (“*Netcom* made a
 18 particularly rational interpretation of § 106 when it concluded that a person had to
 19 engage in *volitional conduct*—specifically, the act constituting infringement—to
 20 become a direct infringer”).

21 In *Religious Tech. Ctr. v. Netcom On-Line Commc’n. Servs., Inc.*, 907 F.
 22 Supp. 1361, 1369-70 (N.D. Cal. 1995), defendant Netcom supplied servers that
 23 provided the means to copy, distribute, or display plaintiff’s works, in the same
 24 manner that the owner of a public copying machine would provide the means for a
 25 third party to copy protected material. *Id.* at 1369. The court held that “There are
 26 no allegations in the complaint to overcome the missing *volitional* or causal

27 (“Perfect 10 incorrectly relies on *Hotaling v. Church of Jesus Christ of Latter-Day*
 28 *Saints* and *Napster* for the proposition that merely making images ‘available’
 violates the copyright owner’s distribution right.”)

elements necessary to hold a BBS [bulletin board service] operator *directly liable* for copying that is automatic and caused by a subscriber.” *Id.* at 1381-82 (emphasis added). In the years since it was decided, *Netcom*’s *volitional* act requirement for direct infringement has been adopted by courts across the country. *See, e.g., Cartoon Network*, 536 F.3d at 131 (2nd Cir. 2008) (“When there is a dispute as to the author of an allegedly infringing instance of reproduction, *Netcom* and its progeny direct our attention to the *volitional conduct* that causes the copy to be made.”) (emphasis added); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (“*Netcom* made a particularly rational interpretation of § 106 when it concluded that a person had to engage in *volitional conduct*—specifically, the act constituting infringement—to become a direct infringer”).

Plaintiff has failed to allege that Amazon or its users engaged in any volitional conduct with respect to the image file at issue after the buy link was removed. Plaintiff concedes there was no volitional conduct on Amazon’s part during the initial upload of the image. Much like in *Netcom*, here that was the third-party seller’s doing. Once uploaded by the third-party seller, the JPEG file remained on Amazon’s internal servers for a period of time. After Amazon received notice and the buy link was removed, Plaintiff’s mere allegation that the image file continued to be “available” does not suggest that Amazon or any user actually *did* anything with the file. He thus fails to allege the *volitional conduct* necessary to state a claim for direct infringement.

Because Plaintiff has presented no allegation that any other person other than he accessed the image files after the buy link was removed, his complaint fails as a matter of law and should be dismissed.

V. PLAINTIFF FAILS TO STATE A CLAIM FOR CONTRIBUTORY INFRINGEMENT, INDUCEMENT, OR VICARIOUS LIABILITY

Plaintiff’s theories of secondary liability – contributory liability, Compl. ¶ 19; active inducement, ¶ 20; and vicarious liability, ¶ 21 – are premised on little

1 more than bare legal recitations and implausible speculations. They each therefore
2 fail as a matter of law.

3 **A. Plaintiff's Claim for Contributory Infringement Fails Because He**
4 **Does Not Allege Amazon Knew or Had Reason to Know of Any**
5 **Infringement After Removal of the Buy Link**

6 A contributory infringer is "one who, *with knowledge* of the infringing
7 activity, induces, causes or materially contributes to the infringing conduct of
8 another." *Perfect 10*, 508 F. 3d 1146 (9th Cir. 2007) (emphasis added) (citing
9 *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d
10 Cir.1971)). The knowledge required for a finding of contributory infringement may
11 not be imputed merely because a technology may be used to infringe a plaintiff's
12 copyrights. *Napster*, 239 F.3d at 1020-21 (discussing *Sony Corp. of America v.*
13 *Universal City Studios, Inc.*, 464 U.S. 417 (1984)). Rather, the defendant must
14 have *actual, specific* knowledge of direct infringement. *Id.* at 1020-22.

15 Here, Plaintiff has not pled facts plausibly suggesting that after the buy
16 listing on the amazon.com website to the Kournikova print was removed, Amazon
17 continued to have knowledge of direct infringement. Quite to the contrary, the
18 complaint alleges that the day after Mr. Rosen sent his notice, Amazon responded,
19 "The listing you identified appears to have been removed from Amazon.com."
20 Comp. ¶ 16. Thus, Amazon believed that the detail listing had already been taken
21 down.

22 Amazon also had no "reason to know" that a user would go to the lengths
23 Mr. Rosen apparently did to access the photo directly from Amazon's image
24 servers. To access the image file after the buy link was removed, would have
25 required a user to identify the URL to Ms. Kournikova's image when the detail
26 page was up, save the encrypted string of letters, and, then, after the listing page
27 was taken down, go to a computer, launch a browser, copy and paste in the saved
28

1 image URL, and then view the picture.¹⁰ That anyone other than Mr. Rosen might
 2 access the image in this way is simply implausible: there are far more convenient
 3 methods of obtaining images of Ms. Kournikova, such as entering her name into
 4 any popular image search engine. Unsurprisingly, Plaintiff does not allege that
 5 anyone – other than he himself – actually ever carried out these steps. Dismissal of
 6 the contributory infringement theory of relief is accordingly appropriate.

7 Mr. Rosen’s own silence regarding the detail listing page URL further belies
 8 his contributory infringement theory. After Amazon responded “that the listing []
 9 identified appears to have been removed from Amazon.com,” Mr. Rosen did not
 10 then promptly notify Amazon that he was still able to retrieve the detail listing page
 11 by directly entering the URL he had saved. When Amazon first became aware of
 12 this issue (in Mr. Rosen’s supplemental declaration in support of summary
 13 judgment in *Rosen I*) Amazon promptly removed that URL, too.

14 Mr. Rosen’s complaints have previously been dismissed for his use of “hide
 15 the ball” tactics when giving notice to service providers. In *Rosen v. Hosting*
 16 *Servs., Inc.*, 771 F. Supp. 2d 1219 (C.D. Cal. 2010), the court ruled that a takedown
 17 notice sent by Mr. Rosen was ambiguous—possibly even “a knowing material
 18 misrepresentation” (*id.* at 1223)—and, as such, the court found that he had failed to
 19 confer knowledge of infringement on the service provider for purposes of
 20 contributory infringement. *Id.* at 1223. As in that previous case, here, Mr. Rosen’s
 21 silence deprived Amazon of the knowledge from which he now seeks to profit, and
 22 he should be estopped from asserting that Amazon “knew or should have known”
 23 of any hypothetical infringement. *See Field v. Google Inc.*, 412 F. Supp. 2d 1106
 24 (D. Nev. 2006) (copyright Plaintiff who remained silent in face of what he believed

25 ¹⁰ Complaint Exhibit 10 is a print out that Plaintiff took of the detail listing page
 26 showing the product as “Currently Unavailable” in late February. Plaintiff does not
 27 allege that he retrieved this page from a search, rather than by having saved the
 28 URL when the detail page was live, and then returning to it after the buy link was
 taken down.

1 was infringement and which he could have readily prevented through a simple
2 notification to service provider, estopped from pursuing copyright claim).

3 Accordingly, Plaintiff's contributory infringement theory should be
4 dismissed with prejudice.

5 **B. Plaintiff's Claim for Active Inducement Liability Fails Because He**
6 **Has Not Alleged Facts That Satisfy *Grokster's* Specific Intent**
7 **Standard**

8 The complaint fails to state a claim for relief for active inducement liability,
9 because there are no allegations that Amazon had the specific intent to induce
10 infringement. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S.
11 913 (2005), the defining case for active inducement liability, the Supreme Court
12 held that "[o]ne who distributes a device with the object of promoting its use to
13 infringe copyright, as shown by *clear expression* or other affirmative steps, . . . is
14 liable for the resulting acts of infringement by third parties." *Id.* at 936-37
15 (emphasis added). This is a specific intent standard. *See id.* at 962-63 (Breyer, J.,
16 concurring) ("As today's opinion makes clear, a copyright holder may proceed
17 against a technology provider where a provable specific intent to infringe (of the
18 kind the Court describes) is present.") The salient facts in *Grokster* were:

- 19 • Grokster and its co-defendants, through their peer-to-peer file sharing
20 architecture, permitted "staggering" infringement by allowing a user to
21 search all of the millions of other users' computers for infringing content
22 files. *Id.* at 921-23.
- 23 • Through advertising and solicitation, the defendants had "clearly voiced
24 the objective that recipients use it to download copyrighted works." *Id.* at
25 924, 927, 939-40.
- 26 • "[T]he business models employed by [defendants] confirm that their
27 principal object was use of their software to download copyrighted
28 works. . . . [they] receive no revenue from users." *Id.* at 926.
- Grokster took no steps to combat infringement, and indeed never

1 responded to takedown notices. *Id.* at 926-27.

2 The heightened showing required for *Grokster*-liability was recently reaffirmed by
3 the Ninth Circuit in *Columbia Pictures v. Fung*, 710 F. 3d 1020 (9th Cir. 2013), in
4 which it emphasized that “*Grokster* requires a high degree of proof of the improper
5 object,” *id.* at 1034, and it is “crucial” that there be an inducing message to users,
6 *id.* at 1035.

7 Unlike with the peer-to-peer networks in *Grokster* and *Fung*, Plaintiff fails to
8 allege a single fact suggesting that Amazon was designed for the purpose of
9 promoting an “improper object” of broad-based copyright infringement. Nor could
10 he. Amazon’s business model, starting with its origins as an online bookseller, to
11 its current status as a leading online retail platform for everything from
12 toothbrushes to TVs, is well known. This business model is not alleged to have any
13 nexus to copyright infringement. In stark contrast to *Grokster* and *Fung*, Plaintiff
14 alleges no facts showing that Amazon “voiced an objective” that sellers showcase
15 infringing products. Contrary to *Grokster* and *Fung*’s tolerance of infringement and
16 their failure to take any meaningful infringement countermeasures, Mr. Rosen here
17 concedes that Amazon responds to take-down notices, including (quite promptly)
18 the one at issue in this case.

19 Plaintiff’s sole contention for inducement liability is that Amazon requires
20 some sellers to post images of their products. However, Exhibit 13 and 14, which
21 are printouts of Amazon’s listing requirements, show that images are required in
22 listings so that buyers can properly identify products and so that images will be of a
23 “consistent” quality and resolution across the site. *See* Exhibit 13, at 3 (“For
24 consistency, all Amazon product pages must include professionally staged images
25 on white backgrounds.”) This neutral policy requiring posting of images alongside
26 products is a necessary part of running an online shopping site. People will not buy
27 products unless they can see them. It applies equally to books, electronics, sports
28 prints of the type at issue here, and all of the other categories of products that

1 Amazon’s third-party merchants sell. Most importantly, this policy does not
 2 compel or encourage infringement; to the contrary, Amazon specifically prohibits
 3 infringement of copyright and other IP rights. Ex. 14, at 1 (“All product images
 4 must meet Amazon site-wide image standards: . . . *Images . . . cannot contain . . .*
 5 *unauthorized content.*”) (emphasis added). This policy does not show the “specific
 6 intent” to promote copyright infringement.

7 Most telling is that Plaintiff advanced nearly identical allegations in *Rosen I*,
 8 and yet, despite over a year of discovery, he failed to uncover any facts that would
 9 lend more credibility to his claims.

10 The Court should dismiss Plaintiff’s inducement claim with prejudice.

11 **C. Plaintiff’s Claim for Vicarious Infringement Fails Because He**
 12 **Alleges No Facts Showing How Amazon Received a Direct**
 13 **Financial Benefit from Infringement After It Removed the Buy**
 14 **Link**

15 The concept of vicarious copyright liability is “an outgrowth of the agency
 16 principles of *respondeat superior*.” *Napster*, 239 F.3d at 1022. To state a claim for
 17 vicarious infringement, a plaintiff must allege that Amazon (1) has the right and
 18 *practical ability* to control the infringing conduct and failed to do so, and (2)
 19 directly profits from third-party copyright infringement. *Grokster*, 545 U.S. at 930.
 20 Where a web host cannot practicably determine what on their systems is infringing,
 the practical ability element is lacking. *See Perfect 10*, 508 F.3d at 1173.

21 **Practical Ability to Control.** Plaintiff’s vicarious infringement theory relies
 22 on a bare recitation of the “practical ability to control” element:

23 “Plaintiff is informed and believes Defendants have and
 24 have had the right and ability to control the infringing
 25 conduct alleged above.” Compl. ¶ 21.

26 Such “threadbare recitals of a cause of action’s elements” cannot support a claim
 27 for relief. *Iqbal*, 556 U.S. at 663. Dismissal is proper on this basis alone.

28 However, even a searching review of the complaint viewed in the light most

1 favorable to Plaintiff shows an utter failure to plead facts that would support a
2 vicarious liability theory of relief. Plaintiff does not plead facts suggesting that
3 Amazon’s relationship with the independent merchants using its platform is on par
4 with that of a principal and agent, or an employer and employee. The merchants
5 are fundamentally “free agents” who post what they want (subject to Amazon’s
6 policies such as those ensuring the authenticity of goods), when they want, for how
7 much they want. They are thus not under Amazon’s “control” any more than
8 Verizon “controls” what people say over their phone lines, or FedEx “controls” the
9 contents of the packages that people ship to each other, subject to packaging
10 restrictions.

11 In *Perfect 10*, in concluding that Google was not liable for vicarious
12 infringement for its image search feature, the Ninth Circuit found that Google’s
13 supervisory power [was] limited because it could not “analyze every image on the
14 [I]nternet, compare each image to all the other copyrighted images that exist in the
15 world ... and determine whether a certain image on the web infringes someone’s
16 copyright.” *Id.* at 1174. Similarly here, Amazon, has no way to know beforehand
17 whether something is infringing and it, like Google, must rely on takedown notices.

18 In *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068 (9th Cir. 2013), the
19 Ninth Circuit recently affirmed dismissal of a plaintiff’s vicarious liability count
20 under Rule 12(b)(6) because the complaint failed to allege control. Specifically,
21 Plaintiff “failed to allege facts that plausibly show that the Carriers could
22 implement an effective system” to monitor alleged copyright infringement and did
23 not explain “what that system is, how it would function, or how much
24 implementing such a system would cost.” *Id.* at 1072. Much like in *Luvdarts*,
25 Mr. Rosen has not presented any facts to support the claim that Amazon had the
26 practical ability to identify infringement. Thus, the same rationale applies here, and
27 dismissal is proper.

28 **Direct financial benefit.** Mr. Rosen similarly fails to sufficiently plead the

1 “direct financial benefit” element of vicarious liability. Once Amazon received Mr.
 2 Rosen’s notice, the ability to buy the Anna Kournikova print at issue was
 3 undisputedly disabled. Compl. ¶ 16. This immediately severed any link between
 4 the JPEG that Mr. Rosen complains remained “active” on Amazon’s internal
 5 servers and any financial benefit to Amazon. Where any causal link between
 6 infringement and financial benefit to a service provider is lacking, dismissal is
 7 appropriate. Thus, in *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004),
 8 the Ninth Circuit affirmed a district court’s ruling that “no jury could reasonably
 9 conclude that AOL received a direct financial benefit from providing access to the
 10 infringing material” where “the record lack[ed] evidence that AOL attracted or
 11 retained subscriptions *because of the infringement*” (emphasis added). Similarly,
 12 Amazon makes money by facilitating the sale of products. Here, once the Anna
 13 Kournikova print was no longer available for sale, Amazon could not have derived
 14 any financial benefit from the work (even if it remained up on Amazon’s internal
 15 servers).

16 The causal nexus requirement for vicarious liability can be satisfied where
 17 the infringement at issue is the “draw.” *Napster*, 239 F.3d at 1023. In *Napster*, “a
 18 majority of Napster users use[d] the service to download and upload copyrighted
 19 music” *Id.* at 1014 (emphasis added). Plaintiff has not and cannot plausibly
 20 allege that users come to Amazon to view and download infringing JPEGs of
 21 products. Consumers obviously go to Amazon’s website to purchase the *products*
 22 themselves. Storage of JPEGs on internal servers is incidental and peripheral to
 23 Amazon’s business model of selling products or enabling third-party vendors to sell
 24 products. Thus, there is no direct financial benefit from the infringement Plaintiff
 25 alleges.

26 As with his theory of active inducement, Plaintiff has had the benefit of over
 27 one year of discovery in *Rosen I* to try to buttress his allegations of vicarious
 28 liability. But he has failed to bring to light any plausible factual allegations to raise

1 his claims beyond the speculative level. The Court should dismiss Mr. Rosen's
2 claim of vicarious liability with prejudice.

3 **VI. CONCLUSION**

4 Plaintiff's complaint fails to allege facts raising his right of relief above the
5 speculative level under any theory of copyright infringement. The Court should
6 therefore dismiss Plaintiff's claims.

7
8 Dated: April 28, 2014

FARELLA BRAUN + MARTEL LLP

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10 By: /s/ Deepak Gupta
11 Deepak Gupta

12 Attorneys for Defendant
13 AMAZON.COM, INC.
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